Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1591

VITUS RODGERS - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY AND APPENDIX

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April 9, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

VITUS RODGERS - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, VITUS RODGERS, respectfully prays that a writ of Certiorari issue to review the Opinion and Order of the Court of Appeals of Kentucky, rendered in this proceeding on August 17, 1979.

OPINIONS BELOW

The Opinion of the Court of Appeals of Kentucky rendered on August 17, 1979 (Appendix A) is not reported. A Petition for Rehearing was filed and was denied on October 12, 1979. (Appendix B)

Motion for Discretionary Review was filed in the Supreme Court of Kentucky and was denied on February 7, 1980. (Appendix C) Mandate was issued by the Court of Appeals on February 8, 1980. (Appendix D)

Upon motion of the Petitioner, the Court of Appeals of Kentucky entered an Order to stay execution and enforcement of the mandate "for a period of 90-days," on February 11, 1980 (Appendix E), staying enforcement of the mandate until May 7, 1980. [NOTE: Petitioner files with this Petition a motion requesting the United States Supreme Court further to enter an Order staying enforcement of the Kentucky mandate pending final disposition of this Certiorari proceeding.]

JURISDICTION

The Opinion of the Court of Appeals of Kentucky (Appendix A) was rendered on August 17, 1979; and a timely Petition for Rehearing was denied by Order of the Court of Appeals of Kentucky (Appendix B) on October 12, 1979; and a timely Motion for Discretionary Review was denied by Order of the Supreme Court of Kentucky (Appendix C) on February 7, 1980; and the Mandate of the Court of Appeals (Appendix D) was issued on February 8, 1980; and this Petition for Certiorari was filed within 90-days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether Petitioner was denied due process of law where there was a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the prosecution and the accused.

2. Whether Petitioner was denied due process of law where the trial judge refused Petitioner's requested instruction on protection of another.

3. Whether Petitioner was denied due process of law where the trial judge prevented Petitioner from making his defense.

4. Whether Petitioner was denied due process of law where the trial judge allowed the prosecution to introduce evidence of an unrelated prior offense by Petitioner which was further developed in closing argument by the prosecutor.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

This is a case in which a criminal defendant's trial was maneuvered into conviction by two first cousins, the judge and the prosecutor. This instance of "cousin justice" in the Casey Circuit Court violated due process of law.

Petitioner Vitus Rodgers was tried for murder in the Casey Circuit Court and was convicted of manslaughter in the first degree. The jury verdict of October 13, 1978, fixed his sentence at fifteen (15) years imprisonment. (Appendix F) This was Petitioner's second trial; the first trial resulted in a hung jury.

In subsequent civil litigation arising from the same facts, Petitioner as defendant was held *not* liable by the jury, on a theory of reasonable protection of others. *See* Judgment, Marion Circuit Court, Civil Action No. 79-CI-075, entered June 21, 1979. (Appendix G)

The facts underlying these proceedings may be stated as follows: Petitioner allegedly killed Archie Lee several hundred yards from Petitioner's home. Archie Lee, allegedly the victim, got drunk and made an armed attack on Petitioner's home. Immediately prior to his armed attack, Lee made several provocative phone calls to Petitioner's home and threatened Petitioner's life. Lee threatened Petitioner's wife that he was coming over within five minutes to kill her husband. [Court of Appeals' Opinion, p. 2; Appendix, p. 18.]

Lee came over to Petitioner's home, and he did fire shots into Petitioner's home. Lee then drove away down the road, turned around, drove back, got out of his car, and fired two more shots at Petitioner who had moved into his yard to protect his home from Lee's aggression. Lee got into his vehicle again and drove away down the road, probably contemplating yet another deadly pass at Petitioner and Petitioner's home. This time, however, Petitioner in his red truck pursued Lee. [Court of Appeals' Opinion, p. 2; Appendix, p. 18.]

In order to prevent the aggressor Lee from making yet another deadly pass at his home and family, Petitioner pursued Lee. Petitioner overtook Lee several hundred yards from Petitioner's home and shot him

six times. Petitioner turned around and returned to Lee's automobile and shot Lee six more times. [Court of Appeals' Opinion, pp. 2, 4; Appendix, pp. 18, 20.]

> It was the defense of Rodgers at the trial that he shot Archie Lee in order to protect his wife and grandchildren as well as himself. [Court of Appeals' Opinion, p. 2; Appendix, p. 18.]

Petitioner's trial in Casey Circuit Court was presided over by a judge who was not a neutral and impartial judge. The judge was, in fact, first cousin to the prosecuting attorney and was, as such, not disinterested in the outcome of Petitioner's trial. Under the state statute, K.R.S. 26A.015(2)(d)(2), the common law of Kentucky, and constitutional principles of due process, Petitioner was denied a fair trial where the trial judge was not qualified to preside. In contrast, it should be noted that the civil litigation arising from the same facts which resulted in a jury verdict of *no* liability, took place in Marion County before a qualified and disinterested judge.

At Petitioner's criminal trial, the Court instructed the jury as to murder, manslaughter in the first degree, and self-defense. [T.R., pp. 27-31.] However, the Court refused Petitioner's requested instruction on protection of another. [T.E., unnumbered pages following p. 158.]

The trial court prevented Petitioner from making his defense when it refused defense evidence of the alleged victim's previous acts of armed violence and violent tendencies, known to Petitioner at the time of

Lee's armed attack. The refused testimony of Donald Helm and Otis Helm, sketched in avowal testimony, demonstrated the alleged victim's previous violent behavior known to Petitioner. [T.E., pp. 157-158.] The trial judge, as to each witness, summarily ruled, "Every bit of that is incompetent," excluded the evidence, and thus thwarted Petitioner's right to present his defense.

On the other hand, at trial, the judge allowed his first cousin the prosecutor to develop collateral evidence of Petitioner's previous misdemeanor conviction for assault and to comment on this offense in closing. [T.E., pp. 124-126, 169.] The admission of such unrelated evidence was prejudicial because it substantially and unfairly weakened the credibility of the Petitioner and the defense in general.

REASONS FOR GRANTING THE WRIT

First Question: Whether Petitioner Was Denied Due Process of Law Where There Was a Likelihood of Bias or an Appearance of Bias That the Judge Was Unable to Hold the Balance Between Vindicating the Interests of the Prosecution and the Accused.

In this case, Petitioner was tried before a judge who was first cousin to the prosecutor. [Affidavit of Counsel, Appendix H.] This close relationship between judge and prosecutor denied the appearance of justice so consistently championed by this Court.

> To perform its high function in the best way 'justice must satisfy the appearance of justice.' *Proctor* v. *Warden,* 435 U. S. 559, 560 (1978).

The close relationship between judge and prosecutor also violated the applicable state statutory provision. K.R.S. 26A.015(2)(d)(2) provides as follows:

> (2) Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:
>
> . . .
>
> (d) Where he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> . . .
>
> 2. Is acting as a lawyer in the proceeding and the disqualification is not waived by stipulation of counsel in the proceeding filed therein.

In the present case, the statutory disqualification of the trial judge was *not* waived by stipulation of Petitioner or Petitioner's counsel. The trial judge was not qualified to preside.

The close relationship between judge and prosecutor in Petitioner's case violated the common law as developed in Kentucky.

> We have held that kinship in the degree of first cousin by blood or marriage is sufficiently close to require disqualification of a trial judge. Wells v. Walter, Ky., 501 S. W. 2d 259 (1973). *Barnes* v. *Cooper,* Ky., 507 S. W. 2d 157, 160 (1974).

In the present case, the trial judge was not qualified under common law to preside over Petitioner's trial.

The close relationship between judge and prosecutor at Petitioner's trial violated due process, as guaranteed by the Fifth and Fourteenth Amendments.

> A fair trial in a fair tribunal is a basic requirement of due process. . . . [O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." [Citation omitted] . . . But to perform its high function in the best way "justice must satisfy the appearance of justice." [Citation omitted] *In re Murchison,* 349 U. S. 133, 136 (1955).

Followed in *Taylor* v. *Hayes,* 418 U. S. 488, 501 (1974); *accord, Tumey* v. *Ohio,* 273 U. S. 510, 532 (1927). In the present case, the first cousin relationship between judge and prosecutor denied Petitioner due process. The close relationship of judge and prosecutor created "the probability of unfairness" and gave the trial judge "an interest in the outcome," as condemned in *Murchison,* quoted *supra.* The close relationship between judge and prosecutor offered a temptation to the judge "not to hold the balance nice, clear and true between the State and the accused," which temptation denies due process as construed in *Murchison,* quoted *supra.*

Clearly, the *appearance* of justice cannot be satisfied where the trial judge is first cousin to the prosecutor in a criminal case.

The *actual effect* of the decision of the Court of Appeals of Kentucky is to approve Petitioner's conviction obtained at a criminal trial in which the judge and the prosecutor were first cousins. The *consequence* of allowing the disputed decision to stand is that "cousin justice" will continue to be approved procedure for the Casey Circuit Court and throughout Kentucky wherever first cousins operate in tandem as judges and prosecutors. Other criminal defendants, like Petitioner, will continue to be subject to unfairness and the appearance of unfairness, in the trial of their cases, in violation of recognized principles of due process.

Second Question: Whether Petitioner Was Denied Due Process of Law Where the Trial Judge Refused Petitioner's Requested Instruction on Protection of Another.

In this case, a critical part of Petitioner's defense was that he killed Archie Lee to protect himself and his family from Archie Lee's armed aggression. The facts are undisputed that Lee threatened to come to Petitioner's home to kill Petitioner, that Lee did come to Petitioner's home and fired shots into Petitioner's home, that Lee drove away a short distance and returned to fire more shots at Petitioner and Petitioner's home. [Court of Appeals' Opinion, p. 2; Appendix, p. 18.] Under these facts, Petitioner's tendered in-

struction on protection of another certainty was justified and the failure to give it was a denial of due process.

Protection of another is a defense recognized by the Kentucky statutes and includes the justifiable use of deadly physical force by a defendant when the defendant "believes that such force is necessary to protect a third person against imminent death." [K.R.S. 503.070(2).] Petitioner acted in this case to protect his wife and grandchildren who were at Petitioner's home when the armed aggressor Lee was shooting into it.

It is axiomatic that a defendant is entitled to have his theory of the case submitted to the jury. *United States* v. *Brown,* 540 F. 2d 364, 380 (8th Cir. 1976); *United States* v. *Winn,* 577 F. 2d 86, 90 (9th Cir. 1978). In the present case, Petitioner was denied that due process right. It should be noted that the defense theory which *prevailed* in the parallel civil proceeding tried before the Marion Circuit Court was, in fact, the theory of reasonable protection of others.

The *actual effect* of the decision of the Court of Appeals of Kentucky is to approve Petitioner's conviction based on the trial court's refusal to present Petitioner's theory of the case to the jury. This is another example of unfair "cousin justice" in the Casey Circuit Court. The *consequence* of allowing the disputed decision to stand is that the practice of refusing tendered instructions on the defendant's very real theory in a criminal case, in violation of due process, will be encouraged.

Third Question: Whether Petitioner Was Denied Due Process of Law Where the Trial Judge Prevented Petitioner From Making His Defense.

At trial, the judge instructed the jury on self-defense but refused to allow Petitioner to introduce evidence as to self-defense. The trial judge refused to allow evidence as to Petitioner's knowledge and belief about the aggressor Lee's prior acts of violence and violent propensities to be presented to the jury. The thrust of the excluded defense evidence is preserved in the avowal testimony of Donald Helm and Otis Helm. [T.E., pp. 157-158.]

Such defense evidence was certainly admissible to establish self-defense and to demonstrate the reasonableness of Petitioner's actions.

> [A]ny evidence which, according to the common experience of mankind, tended to show that the defendant had reasonable cause to apprehend great bodily harm from the conduct of the deceased towards him just before the killing was admissible . . . . *Smith* v. *United States,* 161 U. S. 85, 88 (1896).

Accord, United States v. *Burks,* 470 F. 2d 432 (D.C. Cir. 1972), in which the Court stated:

> As this court has long recognized, evidence of the deceased's violent character, including evidence of specific violent acts, is admissible where a claim of self-defense is raised. Such evidence is relevant on the issue of who was the aggressor and, where there is evidence that the defendant knew of the

> deceased's character, on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm, [Citations omitted.] *Id.*, at pp. 434-435.

In excluding defense evidence clearly probative as to self-defense and the reasonableness of Petitioner's actions in the protection of himself and his family, the trial judge effectively *denied* Petitioners constitutional right to make a defense.

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. *Chambers* v. *Mississippi,* 410 U. S. 284, 302 (1973).

In the present case, the trial judge prevented Petitioner from presenting "his own defense."

> [H]e has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Washington* v. *Texas,* 388 U. S. 14, 19 (1967).

Accord, Davis v. *Alaska,* 415 U. S. 308, 317 (1974); *Edwards* v. *United States,* 312 U. S. 473, 482 (1941). In the present case, the trial judge denied Petitioner's fundamental right "to establish a defense."

The tactic of instructing on self-defense but denying Petitioner's proffered evidence on the issue of self-defense was a fundamentally unfair tactic and a denial of due process.

The *actual effect* of the decision of the Court of Appeals of Kentucky is to approve the trial judge's refusal to allow Petitioner to make his defense. The

trial judge's ruling in this regard is another example of "cousin justice" in the Casey Circuit Court. The *consequence* of allowing the disputed decision to stand is that the egregious practice of giving a self-defense instruction and not allowing defense evidence as to self-defense will be encouraged. The denial of a defendant's fundamental due process right to make a defense, perhaps his only defense, is encouraged.

Fourth Question: Whether the Petitioner Was Denied Due Process of Law Where the Trial Judge Allowed the Prosecution to Introduce Evidence of an Unrelated Prior Offense by Petitioner Which Was Further Developed in Closing Argument by the Prosecution.

Although the trial judge excluded defense evidence relevant to the issue of self-defense and the reasonableness of Petitioner's actions, the trial judge allowed his first cousin, the prosecutor, to provoke an opening to show Petitioner's previous criminal conviction, unrelated to the offense being tried, and to compound that showing by further prosecutorial reference in closing argument.

During cross-examination of Petitioner, the prosecutor provoked an opening to show the jury Petitioner's previous criminal conviction. The prosecutor gratuitously asked:

> Q. 33. All the people in the courthouse know you too, don't they? [T.E., p. 124.]

This provocative question was completely uncalled for. Defense counsel objected. The trial judge allowed the prosecutor to continue:

. . . They all know you too, don't they? [T.E., p. 124.]

Provoked to answer, Petitioner stated that he had not "been in any trouble for 21 years." [T.E., p. 124.]

Over strenuous objection by defense counsel, the trial judge still permitted his first cousin the prosecutor to ask further. The prosecutor made the most of the opportunity. He intentionally framed his question in a substantive way so that evidence of Petitioner's prior crime would be presented to the jury.

> Q. 36. About a year ago wasn't you in this Court and you were tried for cutting your son-in-law and were given sentence of 12 months in jail and a $500.00 fine? [T.E., p. 125.]

The trial judge overruled the defense objection and further evidence of Petitioner's unrelated offense was admitted. [T.E., pp. 125-126.] The prosecutor compounded the prejudicial effect of introducing this incompetent evidence by referring to it again in closing argument. [T.E., p. 169.]

Such evidence was clearly inadmissible in Kentucky under the well-known line of cases beginning with the leading case of *Cotton* v. *Commonwealth,* Ky., 454 S.W. 2d 698 (1970). Such evidence of unrelated prior offenses has been repeatedly held incompetent by this Court.

> [E]vidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a "bad man," without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. *Spencer* v. *Texas,* 385 U. S. 554, 574-575 (1967), Mr. Justice Stewart, concurring.

Accord, Johnson v. *United States,* 318 U. S. 189, 195 (1943); *Boyd* v. *United States,* 142 U. S. 450, 458 (1892). In the present case, the trial judge should never have allowed evidence of Petitioner's unrelated conduct to be presented to the jury. It was also prosecutorial misconduct to have intentionally provoked the introduction of this incompetent and prejudicial information, and to have referred to it again in closing argument.

The manner in which this incompetent and prejudicial evidence of Petitioner's unrelated conduct was introduced demonstrates one way in which first cousins —judge and prosecutor—maneuvered this Petitioner's trial into conviction.

The *actual effect* of the decision of the Court of Appeals of Kentucky is to approve the introduction of incompetent and prejudicial evidence which contributed to Petitioner's conviction, in violation of due process of law. This is another example of unfair

"cousin justice" in the Casey Circuit Court. The trial judge refused competent defense evidence relating to self-defense but allowed incompetent prosecution evidence of Petitioner's unrelated offense. If that is not injustice, then there are no steers in Texas! The *consequence* of allowing the disputed decision to stand is to encourage prosecutors and judges to provoke and allow the introduction of evidence of defendants' prior unrelated offenses, with the result that convictions will be obtained in violation of the Due Process Clause.

CONCLUSION

For these reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Kentucky.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION RENDERED: AUGUST 17, 1979
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 79-CA-115-MR

VITUS RODGERS - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Casey Circuit Court
Hon. James C. Carter, Jr., Judge
No. 78-CR-0019

AFFIRMING

BEFORE: HOWARD, VANCE and WHITE, JUDGES.

HOWARD, JUDGE. The appellant was tried and convicted of the murder of Archie Lee in the Casey Circuit Court and was sentenced to 15 years imprisonment. He appeals from this conviction.

The facts of this case are that on the morning of March 9, 1978, Archie Lee and his friend, Glen Cain, drove to Marion County, Kentucky, where they shot some pool and bought three cases of malt liquor. To make a long story short, both Lee and Cain spent the afternoon drinking and returned to Lee's home. Cain was apparently so intoxicated that he had passed out and, from the evidence, it appears that Lee decided to renew an apparent standing feud with the appellant. There is testimony that Lee and the appellant were related by marriage and had known each other for many years and had had previous trouble.

On the date of the shooting, the appellant testified that Lee had made several provocative phone calls to his home and had threatened his life. The appellant's wife stated that Lee had told her he was coming over to the Rodgers home within five minutes to kill her husband.

The appellant produced evidence which indicated that the deceased did approach the appellant's home and that he did fire shots into the home. He proceeded down the road from the Rodgers place and then returned and got out of his car and fired two more shots at Rodgers, who apparently had gone out into the yard in order to protect his home and the occupants from the gunfire. The deceased then got back into his automobile and drove away, with the appellant in pursuit in his red truck.

Rodgers admitted catching up with the deceased and shooting him six times and that he then turned around in Delois Cain's driveway and returned to the deceased's automobile where he shot Archie Lee six more times. It was the defense of Rodgers at the trial that he shot Archie Lee in order to protect his wife and grandchildren as well as himself.

The first alleged error in the conduct of the trial, argued by the appellant, is that the trial judge should have disqualified himself by reason of the provisions of KRS 26A.015(2)(d)2. This statute reads as follows:

> (2) Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:
>
> (d) Where he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> 2. Is acting as a lawyer in the proceeding and the disqualification is not waived by stipulation of counsel in the proceeding filed therein;

The attorney for the appellant claims that the trial judge and the commonwealth attorney are first cousins, and therefore, the statute quoted above would have required that the trial court step down. Unfortunately, there is nothing in the record that would substantiate this claim. This allegation was made only after the trial had been concluded and was set out in a motion and grounds for a new trial which was not verified. Under these circumstances, we cannot decide the question of whether or not this statute would apply to require a trial judge to step down in a case where the prosecutor is or may be within the above quoted statute. Certainly, we cannot decide this question on this record and the claim of reversible error is without merit.

The next claim of error has to do with the instructions. The first complaint in regard to the instructions is that the trial court gave a qualification of the self-defense instruction. The qualification reads as follows:

> If you believe from the evidence beyond a reasonable doubt that the defendant, Vitus Rodgers, himself, pursued Archie Lee in his automobile and he, Vitus Rodgers, began the encounter by shooting at Archie Lee or into the automobile occupied by Archie Lee, when it was not necessary, and when Vitus Rodgers did not believe it to be necessary in order to protect himself from physical force he believed Archie Lee was then and there about to use upon him, then he, the defendant, Vitus Rodgers, was not privileged to act in self-protection, and you should not excuse the defendant on the grounds of self-defense or apparent necessity.

We find no error with this instruction.

There was strong evidence introduced at the trial to establish that the appellant pursued the victim and began

the encounter by shooting at the victim when it was not necessary, and when appellant did not believe it was necessary to do so in order to protect himself. After all, the victim's automobile was found several hundred yards from appellant's home in a ditch and pointing in a direction away from the appellant's house. The motor, headlights, and windshield wipers were all running as though the victim were attempting to flee when he was driven into the ditch.

The appellant admitted having shot the victim several times and then shortly thereafter he returned to the victim's car and shot him several more times. Under these circumstances, it cannot be said that the qualification on the self-defense instruction was improper. *Hobbs* v. *Commonwealth,* Ky., 481 S. W. 2d 81 (1972), and *Earl* v. *Commonwealth,* Ky. App., 569 S. W. 2d 686 (1978).

In connection with the instruction, the appellant complains of certain language in the self-defense instruction, "then and there," which he now claims improperly limited his right to self-defense. However, this same language was proffered by the appellant in his own self-defense and protection of another instruction which he requested of the trial court. Under the facts of this case, we see nothing improper in the use by the trial court of this language. The limitation suggested by the use of the words "then and there" was proper under the circumstances of this case. It is doubtful, however, that the appellant has properly preserved any alleged error in this regard by his failure to specifically object to this instruction. *Howard* v. *Commonwealth,* Ky., 487 S. W. 2d 689 (1972).

The next complaint as to the instructions concerns the failure of the trial court to instruct the jury on the defense of the protection of another. It is, of course, the law in this jurisdiction that an individual may use deadly physical force upon someone in protection of another. KRS 503.070. However, the use of such deadly physical force is severely

limited. The accused must believe that such force is necessary to protect a third person against the use of unlawful physical force by another and the person whom he seeks to protect would have been justified in using such force against the other person.

In this case, however, the appellant apparently warded off an armed assault by the victim when he shot at or into the appellant's home which, at that time, housed the appellant's wife and grandchildren. He then admittedly got into his truck and pursued the deceased and shot him under the circumstances set out previously in this opinion. It appears to us that once the deceased left the home area of the appellant and was proceeding away from same and being chased by the appellant, that neither the appellant's wife nor their grandchildren were exposed to any danger from the assailant and the requisites mandated by KRS 503.070, for the protection of others simply did not exist. We find no error in the failure of the trial court to give this instruction.

The last allegation of the appellant in regard to the instructions is that he claims that he was entitled to instructions on manslaughter in the second degree and reckless homicide. In this case there was no evidentiary framework upon which inferences could be drawn that the appellant had acted either wantonly or recklessly.

The evidence is clear that the jury could have believed that the appellant acted in self-defense or that he was guilty of an intentional homicide and nothing else. The trial record is devoid of evidence to support the instructions requested by the appellant with respect to this issue. *Butler* v. *Commonwealth,* Ky., 560 S. W. 2d 814 (1978), and *Flener* v. *Commonwealth,* Ky., 514 S. W. 2d 201 (1974).

The appellant next claims that the trial court committed prejudicial error in regard to certain rulings the court made in regard to the evidence.

The first pertains to the contention that the trial court should have permitted the appellant to introduce certain evidence pertaining to the victim's alleged violent propensities and instances of violence. The testimony was elicited by way of avowal from Otis Helm and Donald Helm, each of whom set out specifically certain acts of violence directed towards them and that they had related these instances to the appellant. The trial court ruled that this evidence was not competent and properly so. In the first place, there was ample evidence before the jury that the appellant knew of Lee's violent propensities in regard to his previous actions toward the appellant and, of course, these were testified to by the appellant and his wife. Also, the deceased and the appellant were related by marriage and had known each other for years.

In any event, this type of testimony has never been permitted in this jurisdiction and in the very recent case of *Parrish* v. *Commonwealth,* Ky., 581 S. W. 2d 560 (1979), the court, at page 563, stated as follows:

> The rule in this jurisdiction is that once the defendant has adduced some evidence that he acted in self-defense, "Proof of the violent and dangerous character of deceased can only be made by evidence of his general reputation in the community for such character, and not by evidence of specific acts or general bad conduct, or of isolated facts, which are not connected with the homicide."

During the trial, State Police Detective Hadley testified that a solid projectile appeared to have gone through the window of the victim's automobile, leaving a small hole in the upper lefthand side of that window. Detective Hadley went on to state that the solid projectile could not have been fired by a shotgun due to the size of the hole it left and the configuration of the remaining glass in the rear window.

This testimony, of course, would contradict the testimony of the appellant to some extent since he claimed that when the deceased drove by the appellant's home he shot out of the rear window with his shotgun toward the appellant's home. This does not appear to be an error which would so prejudice the appellant in this case to require reversal.

The police detective's testimony was nothing more than a statement of fact based upon common observation of the small hole in the lefthand side of the window. It is interesting to note that there was a photograph in the record indicating that the rear window had been shot out at the time of the investigation of the shooting and it is hard to see how this testimony would be prejudicial under the circumstances. There was obviously no other conclusion that could have been drawn from the facts as observed by Detective Hadley and certainly this would not be prejudicial. *See Shewmaker* v. *Commonwealth,* 300 Ky. 607, 189 S. W. 2d 957 (1945). If this was an error, it was trivial in nature when compared to the uncontradicted evidence in the record. *Hill* v. *Commonwealth,* 229 Ky. 400, 23 S. W. 2d 930 (1929).

In the course of the cross-examination by the Commonwealth of the appellant, the appellant stated "you show me where I have been in any trouble for 21 years" in answer to an unrelated question. Subsequently, the prosecutor asked the appellant if he had been tried and convicted of a misdemeanor involving his son-in-law. The appellant acknowledged that he had. We cannot see any error here since the appellant himself voluntarily opened up the question of his prior record and it was proper for the prosecution to pursue this matter.

The judgment of the trial court is affirmed.

ALL CONCUR.

Attorney for Appellant:

JERRY FOSTER
McANELLY & FOSTER
Court Square
Liberty, Kentucky 42539

Attorneys for Appellee:

ROBERT F. STEPHENS
Attorney General

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Assistant Attorney General
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Frankfort, Kentucky 40601

APPENDIX B

COURT OF APPEALS OF KENTUCKY

No. 79-CA-115-MR

VITUS RODGERS - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Casey Circuit Court
Hon. James C. Carter, Jr., Judge
No. 78-CR-0019

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOWARD, VANCE and WHITE, JUDGES.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: October 12, 1979

/s/ John D. White
Judge, Court of Appeals

APPENDIX C

SUPREME COURT OF KENTUCKY

79-SC-607-D
(79-CA-115-MR)

VITUS RODGERS - - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

Casey Circuit Court
No. 78-CR-0019

ORDER DENYING DISCRETIONARY REVIEW

It is ordered that movant's motion to supplement the record with a certified copy of a judgment of the Marion Circuit Court, styled Alene Lee, Administrator of the Estate of Archie Lee, Deceased v. Vitis Rodgers [sic], entered June 21, 1979, be denied.

The motion of Vitus Rodgers for a review of the decision of the Court of Appeals is denied.

Stephens, J., not sitting.

ENTERED February 7, 1980.

/s/ John S. Palmore
Chief Justice

APPENDIX D

OPINION RENDERED: AUGUST 17, 1979

COURT OF APPEALS OF KENTUCKY

VITUS RODGERS
v.
COMMONWEALTH OF KENTUCKY

File No.
79-CA-115-MR

Appeal From Casey Circuit Court
Action No. 78-CR-0019

MANDATE—Issued February 8, 1980

The opinion rendered on the above date, a copy of which is attached hereto and made a part hereof, is now final. It appearing that there is no error in the judgment of the Circuit Court, it is therefore the mandate of this Court that said judgment is hereby AFFIRMED.

October 12, 1979—Appellant's Petition for Rehearing Denied.

February 7, 1980—Movant's Motion for Discretionary Review by Supreme Court Denied.

A Copy - Attest:
Issued: February 8, 1980

/s/ John C. Scott, Clerk

(SEAL)

APPENDIX E

COURT OF APPEALS OF KENTUCKY

No. 79-CA-115-MR

VITUS RODGERS - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Casey Circuit Court
Hon. James C. Carter, Jr., Judge

ORDER—Entered February 11, 1980

Upon motion of the Appellant herein, by counsel, to stay execution and enforcement of the mandate in the above-captioned case for a period of 90-days pursuant to C.R. 76.44, and the Court being sufficiently advised, it is hereby

ORDERED that the Appellant's motion is GRANTED.

/s/ John P. Hayes
Judge

Entered: February 11, 1980

APPENDIX F

CASEY CIRCUIT COURT

Ind. No. 78-CR-0019

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

VITUS ROGERS - - - - - - - *Defendant*

ORDER—Entered October 19, 1978

This matter having come on for trial by jury on October 10, 1978, the Commonwealth appearing through the Commonwealth Attorney and County Attorney, and the Defendant VITUS ROGERS, appearing in person and by counsel, the HON. DAVID MCANELLY, HON. JERRY FOSTER, and HON. EARL HUDDLESTON, both parties having announced ready for trial, a jury was ordered, to wit:

Beacham Leach	Mildred Helm
Ella Williams	Virginia Hogue
Charles Noe	Lestor Griffin
Charlie Hatchel	Mose Evans
Robert Casey	Bill M. Green
Dorothy Preston	George Sexton

After hearing the evidence and arguments of counsel, the jury having received the instructions of the Court, retired to their room, and after a while, returned into open court with the following verdict:

"We the jury find the Defendant, VITUS ROGERS guilty as charged and fix his punishment at fifteen (15) years, in the state reformatory S/ George Sexton, Foreman."

Motion having been made by defendant for probation, a report having been made to the Court by the Probation Officer, said report showing the results of the investigation as to the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economical status, education, occupation, and personal habits, and the Court having considered the said report and giving it due consideration, and having reached the conclusion that the defendant was not eligible for probation, due to the violent nature of the crime, and for the reason that to grant probation in this case would unduly depreciate the seriousness of the defendant's crime, and the Court being fully and sufficiently advised,

NOW THEREFORE, IT IS ORDERED AND ADJUDGED that the Defendant, VITUS ROGERS, be, and is hereby sentenced to confinement in the State Reformatory for a period of fifteen (15) years, on Indictment No. 78 CR 0019, and the Sheriff of Casey County shall transport the said defendant to the custody of the Department of Corrections where the said defendant shall remain for the sentence herein set out.

Given under my hand as Judge of the Casey Circuit Court, on this the 19th day of October, 1978.

/s/ Jas. C. Carter, Jr., Judge
Casey Circuit Court

APPENDIX G

MARION CIRCUIT COURT

Civil Action No. 79-CI-075

ALENE LEE, Administratrix of the Estate of
ARCHIE LEE, Deceased - - - - *Plaintiff*

v.

VITIS ROGERS - - - - - - *Defendant*

JUDGMENT—Filed June 22, 1979

This cause having come on for trial on June 20, 1979, pursuant to Order heretofore entered, and Plaintiff having announced ready, and the Court having overruled Defendant's Motion for Continuance; whereupon, the parties proceeded to introduce evidence in their respective behalves and announced closed, and the Court instructed the jury which, after having heard arguments of counsel, retired to consider its verdict and subsequently returned a verdict as follows:

"We, the jury, find for the Defendant."

Signed,

Dee Porter	Barbara Turpin
Harold Mattingly	Isaac Tatum
Violet Bland	Theresa Catherine Bell
Geneva Bland	Margaret Payne
Hugh A. Glasscock	Gerald Hillman

IT IS, ACCORDINGLY, CONSIDERED ORDERED AND ADJUDGED that Plaintiff's Complaint be and the same is hereby dis-

missed, with prejudice, and the cost herein assessed against Plaintiff.

/s/ Robert M. Spragens
Judge, Marion Circuit Court
June 21st, 1979.

APPENDIX H

COURT OF APPEALS OF KENTUCKY

No. 79-CA-115-MR

VITUS RODGERS - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Casey Circuit Court
Hon. James C. Carter, Jr., Judge

AFFIDAVIT—September 5, 1979

STATE OF KENTUCKY }
COUNTY OF MARION } SCT.

Comes the affiant, Elmer J. George, and after having been duly sworn, states and deposes as follows:

1. That he is the attorney of record for the Appellant in the above-captioned proceedings;

2. That he made a good faith effort to obtain for this Court evidence of the relationship of the Trial Judge and the Commonwealth Attorney and Prosecutor in the trial of the above-captioned proceedings held in Casey Circuit Court on October 11-13, 1978, by preparing a Stipulation of the Parties and a Statement of the Trial Judge to be executed by the appropriate parties;

3. That he contacted Paul Carter, Commonwealth Attorney and Prosecutor in the trial of the above-captioned proceedings on Tuesday, September 4, 1979, and requested

of Mr. Carter that he sign said stipulation; that Mr. Carter refused to sign same; however, Mr. Carter did acknowledge during the conversation that James C. Carter, Jr., Judge of the Casey Circuit Court and Judge in the trial of the above-captioned proceedings held in Casey Circuit Court on October 11-13, 1978, and himself are first cousins; further, he stated that the Court of Appeals was aware of this relationship;

4. That he further contacted by telephone, on Tuesday, September 4, 1979, the Hon. James C. Carter, Jr., Judge of the Casey Circuit Court and Judge in the trial mentioned in numerical paragraph 3 hereof and requested that he sign the Statement of the Trial Judge; that he refused but did state that Paul Carter, Commonwealth Attorney and Prosecutor in the trial mentioned in numerical paragraph 3 hereof, and himself are first cousins; further, he stated that the Court of Appeals knew of the relationship between Paul and himself.

FURTHER AFFIANT SAYETH NOT.

/s/ Elmer J. George

Subscribed and sworn to before me by Elmer J. George, this 5th day of September, 1979.

My Commission expires: February 23, 1983

/s/ Lewis Burton Milward, Jr.
Notary Public
State of Kentucky at Large